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IN THE

Supreme Court of the United States

October Term, 1952

No. ———

MANUEL S. MADRUGA,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO,

Respondent.

Petition of Manuel S. Madruga for Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner herein prays that a Writ of Certiorari issue to review the opinion and decision of the Supreme Court of the State of California in the case entitled: Manuel S. Madruga, Petitioner v. Superior Court of the State of California, in and for the County of San Diego, Respondent, L. A. No. 22511, entered December 17, 1952.*

*By order of this Court time to file this petition was extended to April 17, 1953 [R. 33].

Opinion of Court Below.

The opinion and decision of the Supreme Court of the State of California, being the court of last resort in the State of California wherein the questions involved in this petition were resolved, L. A. No. 22511, will be found in 40 A. C. 65, 251 P. 2d 1 [R. 29].

Jurisdictional Statement.

Supreme Court jurisdiction arises:

1. Under Title 28, U. S. C., Section 344(b), Judicial Code, Section 237(b); and

2. Under Title 28, U. S. C., Section 1333 (63 Stats. 101).

Questions Presented.

1. Do courts of the several states have jurisdiction to partition a vessel certificated under the maritime laws of the United States, or is such jurisdiction exclusive in the District Courts of the United States?

2. Do the state courts and the courts of the United States have concurrent jurisdiction in a proceeding to partition a vessel certificated under the maritime laws of the United States by reason of the 1949 Amendment to Title 28, U. S. C., Section 1333 (63 Stats. 101)?

3. Is the remedy provided by the partition statutes of the State of California sufficient to allow the state courts of California to partition a vessel certificated under the maritime laws of the United States?

Statutes Involved.

1. The application and interpretation of Title 28, U. S. C., Section 1333 (63 Stats. 101).

2. California Code of Civil Procedure, Section 752a.

3. California Harbors and Navigation Code, Section 403.

Statement of Facts.

This action was originally instituted by the majority owners of a certificated vessel of the United States to partition said vessel in the Superior Court of the State of California, in and for the County of San Diego [R. 1]. The action was instituted under the provisions of Section 752a of the Code of Civil Procedure of the State of California, which reads as follows:

> "Where several persons are co-owners of any personal property, an action may be brought by any one or more such co-owners for a partition thereof; or in case partition cannot be had without great prejudice to the owners, for the sale thereof, and partition of the proceeds according to the respective interests of the parties. In all such actions the provisions of this chapter shall govern whenever applicable. Real and personal property may be partitioned in the same action."

California Code of Civil Procedure, Section 752a.

The defendant in that action, and the petitioner herein, one of the minority owners of the said vessel, entered a demurrer [R. 2] to the complaint on the grounds that the Superior Court of the State of California did not have jurisdiction to cause a partition of said vessel and that the United States District Court sitting in admiralty was

the only and proper court having jurisdiction of the subject matter. Said demurrer was overruled [R. 2] and petitioner applied to the District Court of Appeal for the State of California for a Writ of Prohibition [R. 11], which writ was denied on the 3rd day of July, 1952 [R. 15]. Thereafter, petitioner sought a hearing in the Supreme Court of the State of California [R. 9], which application for a hearing was granted and an Alternative Writ of Prohibition issued on the 2nd day of September, 1952 [R. 16-17]. Thereafter, the Supreme Court of the State of California denied the peremptory writ and discharged the alternative writ [R. 33]. From the decision and opinion of the said Supreme Court of the State of California petitioner seeks this Writ of Certiorari.

Specification of Errors.

1. The Superior Court of the State of California erred in accepting jurisdiction of the subject matter of a partition suit to partition a vessel certificated under the maritime laws of the United States.

2. The Supreme Court of the State of California erred in holding that the state courts of California had jurisdiction of the subject matter of a partition suit to partition a vessel certificated under the maritime laws of the United States.

Reasons for Granting Certiorari.

1. That the question involved concerns the application of federal statutes concerning the maritime and admiralty jurisdiction of the courts of the United States, and that the Supreme Court of the State of California has decided a federal question of substance not theretofore determined

by this court, or has decided it in a way probably not in accord with applicable decisions of this Court.

2. That the 1949 Amendment to Title 28, U. S. C., Section 1333 (63 Stats. 101), raises the federal question as to whether the saving clause in said section, as amended, makes available to co-owners of a vessel a partition proceeding in the state courts, or whether the saving clause in said section, as amended, refers to remedies known to the common law.

3. That there is no uniformity of decision among the high courts of the several states of the United States or among the federal courts of the United States which have had occasion to pass upon the question involved prior to the 1949 Amendment of Title 28, U. S. C., Section 1333 (63 Stats. 101).

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Supreme Court of the State of California to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and, that the decision and opinion of the said Supreme Court of the State of California be reversed by this Court, and for such other further relief as to this Court may seem proper.

Respectfully submitted,

THOMAS M. HAMILTON,

Attorney for Petitioner.

Of Counsel:

LEVENSON, LEVENSON & BLOCK, and
MCINNIS & HAMILTON.

IN THE

Supreme Court of the United States

October Term, 1952

No. _____

MANUEL S. MADRUGA,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO,

Respondent.

Manuel S. Madruga's Brief in Support of Petition for Writ of Certiorari to the Supreme Court of the State of California.

The petition which accompanies this brief is incorporated herein by reference. It contains:

1. Opinion of Court Below.
2. Jurisdictional Statement.
3. Questions Presented.
4. Statement of Facts.
5. Specification of Errors.
6. Reasons for Granting Certiorari.

ARGUMENT.

Summary of the Argument.

POINT A. TITLE 28, U. S. C. SECTION 1333 (63 STATS. 101) DOES NOT ENLARGE THE JURISDICTION OF STATE COURTS SO AS TO CREATE CONCURRENT JURISDICTION ON THE UNITED STATES COURTS AND THE COURTS OF THE SEVERAL STATES OF THE UNITED STATES IN ACTIONS TO PARTITION VESSELS CERTIFICATED UNDER MARITIME OR ADMIRALTY LAWS OF THE UNITED STATES.

POINT B. AN ACTION TO PARTITION A VESSEL CERTIFICATED UNDER THE MARITIME LAWS OF THE UNITED STATES IS AN ACTION *IN REM* AND THEREFORE WITHIN THE EXCLUSIVE JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES SITTING IN ADMIRALTY.

POINT C. EXCLUSIVE JURISDICTION IN THE DISTRICT COURTS OF THE UNITED STATES SITTING IN ADMIRALTY IN ACTIONS FOR THE PARTITION OF VESSELS CERTIFICATED UNDER THE MARITIME LAWS OF THE UNITED STATES WILL INSURE UNIFORMITY IN THE APPLICATION OF SUBSTANTIVE RULES OF ADMIRALTY LAW.

POINT A.

Title 28, U. S. C., Section 1333 (63 Stats. 101) Does Not Enlarge the Jurisdiction of State Courts so as to Create Concurrent Jurisdiction on the United States Courts and the Courts of the Several States of the United States in Actions to Partition Vessels Certificated Under Maritime or Admiralty Laws of the United States.

In order to clarify the several issues arising out of this litigation, it is suggested that several observations be made.

First, this action was originally instituted in the Superior Court of the State of California, in and for the

County of San Diego [R. 1] to partition a vessel certificated under the maritime laws of the United States. It appears that the home port of said vessel is San Diego, California, and although the complaint in the original action is silent, said vessel is a tuna vessel operating in international waters of the Pacific Ocean.

Second, the action was instituted by the majority owners in interest as against the defendant, who is the petitioner herein and who is the owner of a fifteen per cent (15%) interest [R. 1].

Third, the original complaint is silent as to the existence of any dispute among the owners, either in the operation of the vessel, the management thereof, or any other matter.

The action was instituted under the partition statutes of the State of California and particularly Section 752a of the *Code of Civil Procedure* of the State of California, which reads as follows:

> "Where several persons are co-owners of any personal property, an action may be brought by any one or more such co-owners for a partition thereof; or in case partition cannot be had without great prejudice to the owners, for the sale thereof, and partition of the proceeds according to the respective interests of the parties. In all such actions the provisions of this chapter shall govern whenever applicable. Real and personal property may be partitioned in the same action."

California Code of Civil Procedure, Section 752a.

The code section involved relates to the partition of any personal property and it is therefore assumed by the plaintiff in the original action that any personal property

would include a vessel certificated under the maritime laws of the United States. That this assumption is incorrect is indicated by a provision to be found in the Harbors and Navigation Code of the State of California, Section 403, which reads as follows:

> "If a vessel belongs to several persons, not partners, and they differ as to its use or repair, the controversy may be determined by any court of competent jurisdiction."
>
> *California Harbors and Navigation Code*, Section 403.

It is to be noted that the California Code of Civil Procedure, Section 752a, allows for the partition between co-owners of personalty without regard to the existence of a dispute among the owners as to any matters concerning the personalty involved. It appears to be an automatic process. This observation is important in view of the discussion of the substantive rules of admiralty which will later be considered.

Section 2 of Article III of the United States Constitution defines the power of the United States courts, and we find that such power extends—

> ". . . to all cases affecting ambassadors, other public ministers and counsels; . . . to all cases of admiralty and maritime jurisdiction; . . ."
>
> *United States Constitution*, Article III, Section 2.

From the constitutional provision there was enacted into the laws of the United States Section 9 of the Judiciary

Act of 1789. See Act of September 24, 1789, Chapter 20 (1 Stats. at L. 73, 77, Jud. Code, Sec. 24(3), 28 U. S. C., Sec. 41(3)).

Section 41(3) of the Judicial Code was subsequently repealed, and in 1948 Title 28, U. S. C., Section 1333 was substituted. This section contained substantially the same language of the saving clause, to-wit: "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

In 1949, Title 28, U. S. C., Section 1333 (63 Stats. 101), was amended to provide that the District Courts (*of the United States*) have original jurisdiction exclusive of the state courts of any case of admiralty or maritime jurisdiction "saving to suitors in all cases all other remedies to which they are otherwise entitled."

By reason of the 1949 Amendment, the question is raised as to whether the jurisdiction of the state courts of the several states of the United States has been extended so as to encompass actions which, although maritime in nature, were unknown to the common law.

The Supreme Court of the State of California in the present case (*Madruga v. Superior Court* (1952), 40 A. C. 65, 251 P. 2d 1) [R. 29] has taken the position that by reason of the 1949 Amendment to Title 28, U. S. C., Section 1333 (63 Stats. 101), it is no longer required that state courts determine the availability of a common law remedy, but that it is only necessary to determine whether an action for partition, as in the present case, is

available to co-owners of a vessel in the state courts. The Court uses the following language:

> "Thus at this time there is no necessity to resolve the question whether the reservation of the original section referred only to remedies known to the common law. The question is whether there is now available to coowners of a vessel a partition proceeding in the state courts."
>
> *Modrugo v. Superior Court* (1952), 40 A. C. 65 at page 67, 251 P. 2d 1 at page 2.

It is true that co-owners of personalty have available to them rights of partition under the statutes of the State of California. However, in an action to partition a vessel certificated under the maritime laws of the United States, it is questioned that the California statutes or similar statutes of other states would apply in view of the necessity of applying substantive rules of admiralty law.

The courts of the State of Washington, in the case of *Cline v. Price* (1951), 39 Wash. 2d 816, 239 P. 2d 322, discuss the precise question. In this case the Court had before it an action for partition instituted by a minority owner. The Court holds that such an action is exclusively within the jurisdiction of the United States District Court sitting in Admiralty and that the state court cannot presume upon that jurisdiction. After examining many cases, and particularly the case of *Andrews v. Betts* (1876), 15 N. Y. (Sup. Ct. Rep. 8 Hun.) 322, the Washington Court observes that the cases assume that "if equity provides such a remedy as to any personal property, it will do so as to a vessel subject to admiralty jurisdiction." The Court further observes that this assumes the very point in controversy. The Court cites, with approval, 1 Bene-

dict on Admiralty (Sixth Ed.), page 38, Section 23, to the effect that the saving clause of the Judiciary Act of the Judicial Code does not contemplate admiralty remedies in a common law court. In an examination of the authorities, the Washington Court analyzes the case of *State v. Watts*, 7 La. 440, 26 Am. Dec. 507, along with other decisions upon which it is contended that concurrent jurisdiction is saved to the state courts by operation of the saving clause of the Judicial Code. The Washington Court points out that the decision of the *Watts* case was based upon Judge Story's commentaries on the Constitution (3 Story Com. 527, *et seq.*). However, Judge Story in his commentaries was not speaking of actions for partition which are essentially *in rem*, but rather, was referring to contracts, claims and services where relief may be obtained in a suit *in personam*. It is further observed that the *Watts* case was primarily an action to recover on an indebtedness, a remedy which the common law is competent to give.

The Washington Court, in an examination of the case of *Andrews v. Betts* (1876), 15 N. Y. (Sup. Ct. Rep. 8 Hun.) 322, observes that the New York Court assumes that if equity provides such a remedy—partition—as to any personal property it will do so as to a vessel subject to admiralty jurisdiction. Here the Washington Court states that the assumption is the very point in controversy.

In the present case, the California Supreme Court, on the authority of *Jordine v. Walling* (1950), 185 F. 2d 662, makes the observation that Section 1333 was amended in 1949 to conform with the decision as in *Andrews v. Betts, supra*, to the effect that any competent court having jurisdiction of the parties is authorized to entertain a

civil action for the enforcement of a right conferred by the maritime law where adequate relief might be given in the action. In the *Jordine* case we find a situation wherein the plaintiffs sought to recover for damages under the Jones Act. One of the questions presented in the case was whether the District Court had jurisdiction to entertain a cause of action for maintenance and cure in a civil action brought and tried under Federal Rules of Civil Procedure as distinguished from a suit in admiralty brought and tried under the Admiralty Rules and Procedure; and secondly, did the District Court acquire jurisdiction because the complaint originally included a count for damages for negligence under the Jones Act.

To the interpretation by the California Court of the language of the *Jordine* case we cannot agree. The *Jordine* case points out that the saving clause did not change the original intent of Title 28, U. S. C., Section 1333, and that the "saving to suitors" clause was intended to carry into Title 28, in modern and simplified form, the similar provisions of the Judicial Code of 1911. In other words, the amendment was made for the purpose of expressing the original intent of Congress and to make it conform to Rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between law and equity.

Jordine v. Walling (1950), 185 F. 2d 662.

That our interpretation of the *Jordine* case is sound appears from the Reviser's Note to Title 28, U. S. C., Section 1333 (63 Stats. 101), which reads as follows:

> "The 'saving to suitors' clause in said sections 41(3) and 371(3) was changed by substituting the words 'any other remedy to which he is otherwise entitled' for the words 'the right of a common-law remedy

where the common law is competent to give it.' The substituted language is simpler and more expressive of the original intent of Congress and is in conformity with rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between law and equity."

Reviser's Note to Title 28, U. S. C., Section 1333 (63 Stats. 101).

The *Jordine* case can only be held authority for the proposition that claims for compensatory damages under the Jones Act and for maintenance and cure are separate and distinct causes of action. The claim under the Jones Act is federal in character, but that a count for maintenance and cure in a civil action tried to a jury, although arising under maritime law, is non-federal in character, and that as to such a count the state courts would have jurisdiction. The real point in issue in the *Jordine* case was the availability of a jury to the plaintiff on the several counts; that the count for maintenance and cure being of a maritime nature could only be tried to a court of admiralty without a jury, and that a civil action for damages under the Jones Act could not be tried in admiralty because of the right of the plaintiff to a jury trial.

Jordine v. Walling (1950), 185 F. 2d 662.

If the interpretation set forth above and as indicated by the Reviser's Note is correct, we must then look to the decisions as they existed prior to 1949 to determine whether an action for partition was available at common law.

Prior to the 1949 Amendment to Title 28, U. S. C., Section 1333, the courts were divided on the proposition.

California, in the case of *Fischer v. Carey* (1916), 173 Cal. 185, 159 Pac. 577, L. R. A. 1917A 1100, unqualifiably laid down the rule that such an action was not available at common law; that it was an action *in rem* and within the maritime and admiralty jurisdiction of the federal courts, and that the state courts of California could not entertain such an action. This holding was made after a critical examination of all the authorities. Again, as late as 1928, in the case of *Higgins v. Eva*, 204 Cal. 231, 267 Pac. 1081, the California Court had before it a case in which a vessel owned by co-owners as tenants in common became wrecked. The vessel was salvaged and repaired by respondent majority owners. The action involved the rights of the parties as a result of appellant's failure to pay his proportionate share of the costs. It appears that the action was intended as one to compel appellant, a minority owner, to sell his interest in the vessel to respondents, the majority owners. The Court, on the authority of *Fischer v. Carey, supra*, held that the relief prayed for was *in rem* and not a common law remedy, and that the jurisdiction for the relief prayed for was vested exclusively in the District Courts of the United States. The Court in the *Higgins* case, after an examination of the factual situation, makes the observation that if the action be construed to be an action for the recovery of money, the proof falls short of the claim by respondents.

Higgins v. Eva, 204 Cal. 231, 267 Pac. 1081.

In the case of *Fischer v. Carey*, 173 Cal. 185, 159 Pac. 577, L. R. A. 1917A 1100, to which reference has been made, the Court makes an exhaustive examination of the several cases, passing upon the point in question, and

refers to the cases of *Steamboat Orleans v. Phoebus* (1837), 36 U. S. (11 Pet.) 175 (9 L. Ed. 677); *Ocean Belle Case* (1872), 6 Ben. 253 (Fed. Cas. No. 10,402); *The Seneca*, 3 Wall. Jr. 395 (Fed. Cas. No. 12,670), and *Tunno v. Betsina* (Fed. Cas. No. 14,236, 24 Fed. Cas. 316). With regard to this line of cases, it must be noted that the actions were for the most part instituted by minority owners and a substantive rule of admiralty jurisdiction was involved, to-wit: the question of whether a Court of Admiralty would entertain a suit instituted by a minority interest, or whether the interests were of such a nature as to prevent courts of admiralty from giving the relief granted. The United States courts entertained the jurisdiction of the subject matter, and in each case, regardless of the language employed, the judgments were upon the merits. It would therefore appear that by their holding the courts did not mean to say that the Admiralty Court had no jurisdiction, but rather, that having jurisdiction they would not exercise it to grant the remedy or relief prayed for.

The *Fischer v. Carey* case* makes the following observation:

> "We conclude, therefore, that the reasoning of Professor Pomeroy is the most satisfactory, and that reasoning is that while equity will in general partition chattels when the chattel is a ship, this direct action against the *res* must be brought in admiralty alone."

Fischer v. Carey (1916), 173 Cal. 185 at 195, 159 Pac. 577, L. R. A. 1917A 1100.

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*This paragraph appears in the official California Report, but was apparently omitted by oversight in 159 Pac. 577.

Pomeroy's Equity Jurisprudence, Fifth Edition, has been examined closely, and although nothing is found which specifically relates to a ship or vessel, Pomeroy does make the following statement:

> "The rules and proceedings which obtained at common law and by statute on the subject of partition related exclusively to real estate."
>
> *Pomeroy's Equity Jurisprudence*, Fifth Edition, Section 1391, page 1019.

And again:

> "However expedient the partition of chattels might appear, or however desirable it might be to the cotenants, the common law furnished no instrumentality by which the partition could be judicially effected. There was not merely an inadequacy of legal remedy, there was an utter absence of it. The situation clearly demanded the intervention of equity."
>
> *Pomeroy's Equity Jurisprudence*, Fifth Edition, Section 1391, page 1020.

In 1 Benedict on Admiralty the rule is clearly stated:

> "The saving clause of the Judiciary Act and of the Judicial Code does not contemplate admiralty remedies in a common law court. Its meaning is that in cases of concurrent jurisdiction in admiralty and at common law, the jurisdiction in the latter is not taken away. The remedy which State courts may administer, though it may be subject of regulation and modification by State statute, must be according to the general course of the common law."
>
> 1 *Ben. on Admiralty*, Sixth Edition, Section 23, page 39.

In the case of *Swain v. Knapp*, 32 Minn. 429, 21 N. W. 414, a minority owner sought an accounting, the appointment of a receiver and the sale of a vessel in the courts of Minnesota. The Court, in facing the issue and in discussing whether the remedy sought was one of the reserved common law remedies, states:

> "The defendant is unquestionably right in his position that this saving is of a common-law remedy, and not merely of a remedy in a common law court. (The Moses Taylor, 4 Wall. 411 (18 L. Ed. 397)) and that the remedies sought in this action are not common-law remedies."
>
> *Swain v. Knapp*, 32 Minn. 429 at 431, 21 N. W. 414 at 415.

The Minnesota Court, however, erroneously assumes jurisdiction by reasoning that since the remedies sought are not afforded in admiralty, then the subject matter is not within admiralty jurisdiction.

In the case of *Waring v. Clark* (1847), 46 U. S. (5 How.) 441, 461, 12 L. Ed. 226, 236, the Court was considering an action to recover damages for injuries arising from a collision among vessels operating on the Mississippi River. The Court makes an exhaustive examination of admiralty jurisdiction and reviews not only admiralty jurisdiction as it was known in England, but goes exhaustively into the proceedings before the Continental Congress, leading up to the constitutional provision setting forth the maritime jurisdiction of the United States courts and the Judiciary Act of 1789, and comes to the conclusion that the admiralty powers given to the courts of the United States were not limited by what were cases of admiralty jurisdiction in England, but extends far be-

yond those limitations. The Court further examines the situation with regard to actions at common law as distinguished from those in admiralty and recognizes that suits at common law are a distinct class so recognized in the Constitution and that such suits indicate a class to distinguish them from suits in equity and admiralty principally by reason of the right of trial by jury at common law as against the established rules in admiralty which preclude such a trial.

We must therefore conclude that the acceptance of jurisdiction by state courts is an infringement upon admiralty jurisdiction and an unwarranted enlargement of jurisdictional powers of the state courts; that the partitioning of a vessel certificated under the maritime or admiralty laws of the United States is one which was not known to common law; that the saving clause in Title 28, U. S. C., Section 1333, prior to the 1949 Amendment, at no time would allow for jurisdiction in state courts of admiralty matters and particularly as to matters relating to the partition of vessels, and that the 1949 Amendment was not intended to enlarge upon the jurisdiction of state courts so as to allow them to infringe upon admiralty jurisdiction. Since an action for partition of a vessel was never known to the common law, state courts cannot, as stated in 1 Benedict on Admiralty, Sixth Edition, Section 23, page 38, and used and approved in *Fischer v. Carey, supra*, confer jurisdiction upon its courts to proceed *in rem*.

POINT B.

An Action to Partition a Vessel Certificated Under the Maritime Laws of the United States Is an Action in Rem and Therefore Within the Exclusive Jurisdiction of the District Courts of the United States Sitting in Admiralty.

Most of the confusion that exists among the decisions rests upon the question as to whether an action to partition a vessel was one known to the common law.

Before making such a determination, however, the question must first be answered as to whether this type of action is one *in rem* or *in personam*. That a proceeding *in rem* is the exclusive prerogative of all civil admiralty and maritime jurisdiction in the United States courts cannot be questioned.

1 Benedict on Admiralty, Sixth Edition, Section 23, pages 38 and 39;

The Moses Taylor (1866), 71 U. S. (4 Wall.) 411, 18 L. Ed. 397.

The California Supreme Court in the present case, *Madruga v. Superior Court*, 40 A. C. 65 (1952), 251 P. 2d 1 [R. 29], has avoided this determination by its interpretation of Title 28, U. S. C., Section 1333, as it now reads. However, it cannot be said that the California Supreme Court has overruled its decision in the case of *Fischer v. Carey*, 173 Cal. 185, 159 Pac. 577,

L. R. A. 1917A 1100 (1916), in which case the California Court states:

> "Hence, if this view be correct, a court of equity, though competent, is not empowered to give relief when such a disagreement amongst the owners shall arise, since essentially the proceeding is *in rem*, and so invades the reserved admiralty jurisdiction over the vessel. Such an equitable remedy is not amongst those which are saving to suitors by virtue of the Federal Judiciary Act."
>
> *Fischer v. Corey*, 173 Cal. 185 at 193, 159 Pac. 577, L. R. A. 1917A 1100 (1916).

It is true that there is language in the cases indicating that a proceeding to partition (licitation or sale) is one both *in rem* and *in personam*. However, it is submitted that the *in personam* characteristics of such an action are incidental since it is necessary to join all co-owners. The action principally is one *in rem* against the vessel.

Madruga v. Superior Court (1952), 40 A. C. 65, 251 P. 2d 1 [R. 29];

Cline v. Price (1951), 239 P. 2d 322, 39 Wash. 2d 816;

Tucci v. Arbuato (S. D. N. Y.), 56 F. 2d 666.

From the foregoing authorities it would therefore appear that an action to partition a vessel certificated under the maritime laws of the United States is an action *in rem*, and being *in rem* is within the exclusive jurisdiction of the admiralty courts of the United States.

POINT C.

Exclusive Jurisdiction in the District Courts of the United States Sitting in Admiralty in Actions for the Partition of Vessels Certificated Under the Maritime Laws of the United States Will Insure Uniformity in the Application of Substantive Rules of Admiralty Law.

Although the several cases heretofore cited have discussed the question of the effect of the saving clause of Title 28, U. S. C., Section 1333, both prior and subsequent to the 1949 Amendment, resulting in a variety of conclusions, and although the cases have rested their decisions in many instances upon the question as to whether an action to partition is one *in rem*, *in personam* or *quasi in rem*, there still remains a third consideration which seems to run through the several cases and which requires clarification.

We have heretofore made the observation that the instant case was an action instituted by the majority owners of the vessel. Many of the cases previously cited discuss the proposition as to the rights of majority and minority owners in actions to partition. In other words, the primary questions of jurisdiction appear to rest on substantive rules of admiralty. The following cases were actions instituted by minority owners:

Fischer v. Carey (1916), 173 Cal. 185; 159 Pac. 577, L. R. A. 1917A 1100;

Cline v. Price (1951), 39 Wash. 2d 816, 239 P. 2d 322;

Andrews v. Betts (1876), 15 N. Y. (Sup. Ct. Rep. 8 Hun.) 322;

Steamboat Orleans v. Phoebus (1837), 36 U. S. (11 Pet.) 175 (9 L. Ed. 677);

Ocean Belle Case (1872), 6 Ben. 253 (Fed. Cas. No. 10,402);

The Seneca, 3 Wall. Jr. 395 (Fed. Cas. No. 12,670).

As ably pointed out in the case of *Fischer v. Carey*, *supra*, admiralty may order a sale of the vessel at the instance of majority owners; that admiralty has jurisdiction to decree a sale either as to majority or minority owners cannot be questioned, but for reasons sufficient unto itself, admiralty will not exercise its power except as between equal interests. Such is the statement of Benedict on Admiralty, to-wit:

". . . such jurisdiction being exercised only as between equal interests." (Citing the cases of *The Red Wing*, 1926 A. M. C. 336 (S. D. Cal.); *Steamboat Orleans v. Phoebus* (1837), 36 U. S. (11 Pet.) 175, 9 L. Ed. 677; *The Ocean Belle* (1872), 6 Ben. 253, Fed. Cas. No. 10402 (S. D. N. Y.); *Lewis v. Kinney* (1879), 5 Dill. 159, Fed. Cas. No. 8325 (E. D. Mo., C. C.); *Bradshaw v. The Sylph* (1841), 2 Betts D. C. M. S. 58, Fed. Cas. No. 1791 (D. C. N. Y.).)

1 *Benedict on Admiralty*, Sixth Edition, Section 74, page 158.

The cases cited, as pointed out in *Fischer v. Carey*, 173 Cal. 185, 159 Pac. 577, L. R. A. 1917A 1100, *supra*, are cases in which the courts in admiralty have assumed jurisdiction of the subject matter but have refused the relief sought, namely, the awarding of a decree in partition at the instance of minority owners. This, we sub-

suit, is a substantive rule of admiralty law, and is not a rule conferring jurisdiction upon state courts or the United States courts sitting in admiralty. In cases where state and federal courts have been called upon to assume jurisdiction by reason of a common law remedy involved, there is language indicating that the substantive rule as announced by admiralty should be applied in the same manner as in an admiralty court, that is to say, general maritime law as developed and declared in the last analysis by this Honorable Court, or as modified from time to time by act of Congress.

Jonsson v. Swedish American Line (C. A. Mass., 1950), 185 F. 2d 212.

As to substantive rules of admiralty, it is well settled:

1. A court of admiralty will not direct the sale of a vessel for the purpose of effecting partition between different owners.

2. Since the rule giving control to majority ownership cannot operate, as between equal owners, the Court will interfere out of regard for the public interest.

3. A court of admiralty will interfere upon the application of majority interest under special circumstances.

Swain v. Knapp, 32 Minn. 429, 21 N. W. 414.

Substantive rules of admiralty law presuppose disagreement among the co-owners in the use and operation of a vessel before considering the matter of partition. The instant case, on the other hand, proceeds under the general rules of partition law in California which do not require such disagreement. The mere fact that one is a co-owner, without reference to his interest, whether it be

minority or majority, is sufficient to allow a court of equity to decree a partition. This rule, if extended, would allow the courts of other states to assume jurisdiction of matters of admiralty jurisdiction and circumvent the acknowledged rules of admiralty as so clearly pointed out in *Cline v. Price*, wherein the Court states:

> "Appellants, being minority owners, are here confronted with an admiralty principle which prevents them from obtaining, in an admiralty court, the desired sale of the vessel for partition. They seek to circumvent that obstacle by applying to the state court for relief, and point to the saving clause above referred to as permitting this recourse."
>
> *Cline v. Price* (1951), 39 Wash. 2d 816 at 822, 239 P. 2d 322 at 326.

The precise situation exists in the instant case, for the owners, though they be majority, here seek to dispossess a minority owner in the absence of disagreement as indicated by a complete absence of recitals in the complaint [R. 1] of disagreement among the owners as to any matter concerning said vessel.

The *Cline* case further states the rule to be:

> "The fundamental purpose of Art. III, Sec. 2, of the Federal Constitution was to 'preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the federal government.' *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 S. Ct. 438, 440, 64 L. Ed. 834. The saving clause, 28 U. S. C. A. Sec. 1333(1), was never intended as a device whereby litigants could escape the uniform application of established principles of admiralty law, as contemplated by the Constitution. This is indicated by such de-

cisions as *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 217, 37 S. Ct. 534, 61 L. Ed. 1086; *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 384, 38 S. Ct. 501, 62 L. Ed. 1171; *Knickerbocker Ice Co. v. Stewart, supra*; and *Washington v. W. C. Dawson & Co.*, 264 U. S. 219, 44 S. Ct. 302, 68 L. Ed. 646, affirming 122 Wash. 572, 211 P. 724, 212 P. 1059, 31 A. L. R. 512."

Cline v. Price (1951), 39 Wash. 2d 816 at 822, 239 P. 2d 322 at 326.

In the case of *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 384, 38 S. Ct. 501, 62 L. Ed. 1171, we find particularly applicable language:

". . . . Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. . . ."

Chelentis v. Luckenbach S. S. Co., 247 U. S. 372 at 384, 38 S. Ct. 501 at 504, 62 L. Ed. 1171.

Cline v. Price (1951), 239 P. 2d 322, 39 Wash. 2d 816, and the *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 S. Ct. 438, 440, 64 L. Ed. 834, approved the language to be found in the case of *The Lottawanna*, 21 Wall. 558, 88 U. S. 558, 22 L. Ed. 654, which language is as follows:

"That we have a maritime law of our own, operative throughout the United States, cannot be doubted. . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law

coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistence at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

The Lottawanna, 21 Wall. 558 at 574, 88 U. S. 558, 22 L. Ed. 654.

It is therefore submitted, in view of the foregoing authorities, that the present state of the decisions creates an untenable situation with reference to a fundamental rule of substantive admiralty law. The Supreme Court of the State of California in the instant case, by a process of reasoning, has changed the law of the State of California. The *Cline* case, *supra*, on the other hand, appears to be entirely contrary to the California decision. Although it appears that the federal authorities cited are in disagreement, we submit that in each of the federal decisions the Court sitting in admiralty has assumed jurisdiction of the subject matter but has denied the relief sought. That this confusion must be clarified is apparent. The implication of the lack of uniformity is of utmost importance to those persons particularly in the fishing industry where it is a matter of common practice that vessels be owned in co-ownership. If the courts of California are allowed to assume jurisdiction of this type of action under its present statutes, the interests of all minority owners in

vessels will have been jeopardized to the extent that they are without the protection allowed by courts of admiralty, and this would be true both in matters of procedure as well as substantive law. They may be dispossessed and their rights prejudiced without reason and without cause. Such was not the intent of admiralty jurisdiction and cannot be said to fall in line with any announced principles of equity.

Conclusion.

In conclusion, it is respectfully submitted that the questions stated in the petition and discussed in this brief bring before this Honorable Court matters involving fundamental issues affecting numerous owners of small interests in fishing vessels throughout the United States.

This Honorable Court is respectfully urged to grant certiorari to finally determine the questions presented, namely:

(a) Whether Title 28, U. S. C., Section 1333 (63 Stats. 101), enlarges the jurisdiction of state courts so as to give them either original jurisdiction or concurrent jurisdiction with the courts of the United States in actions to partition vessels certificated under the maritime laws of the United States.

(b) Whether an action to partition a vessel certificated under maritime laws of the United States is an action *in rem* and therefore within the exclusive jurisdiction of the District Courts of the United States sitting in admiralty.

(c) Whether exclusive jurisdiction in the District Courts of the United States sitting in admiralty in actions for the partition of vessels certificated under the maritime laws of the United States will insure uniformity in the application of substantive rules of admiralty law.

For the reasons stated and advanced, we respectfully urge this Honorable Court that a Writ of Certiorari issue under the seal of this Honorable Court, directed to the Supreme Court of the State of California to the end that this cause may be reviewed and determined by this Honorable Court and the several issues finally resolved.

Respectfully submitted,

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Of Counsel:

LEVENSON, LEVENSON & BLOCK, and

McINNIS & HAMILTON.

Service of the within and receipt of a copy thereof is hereby admitted this_____day of April, A. D. 1953.

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